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No. 00-1711

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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As we note in our petition for a writ of certiorari, this case presents essentially the same questions as does *Mathias* v. *WorldCom Technologies, Inc.* (No. 00-878): whether federal district courts have statutory jurisdiction to review decisions of state public utility commissions enforcing interconnection agreements entered into pursuant to the Telecommunications Act of 1996 (1996 Act), and, if so, whether state commissions or their commissioners may be made defendants to such proceedings consistent with the doctrine of sovereign immunity reflected in the Eleventh Amendment. Consequently, we have asked the Court either to hold our petition for disposition in light of *Mathias* or, alternatively, to grant the petition and to consider this case together with *Mathias*.

The respondents Public Service Commission of Maryland (MPSC) and its commissioners (collectively, MPSC) do not suggest that this case is an inappropriate

vehicle in which to consider those questions. Indeed, the MPSC expressly does not oppose certiorari on three of the four questions presented in our petition: whether 47 U.S.C. 252(e)(6), a provision of the 1996 Act, vests district courts with jurisdiction over suits contending that a state commission has enforced an interconnection agreement in a manner contrary to federal law; whether state commissions have waived their immunity from such suits by electing to exercise regulatory authority under the 1996 Act; and whether state commissioners, in their official capacities, may be made defendants to such suits under *Ex parte Young*, 209 U.S. 123 (1908). See MPSC Br. in Opp. 10, 12. The MPSC contests only whether certiorari is warranted on the remaining question presented in our petition: whether, if one assumes *arguendo* that 47 U.S.C. 252(e)(6) does not confer jurisdiction on district courts to review state commissions' enforcement decisions for compliance with federal law, district courts may exercise such jurisdiction under 28 U.S.C. 1331.

For the reasons articulated in our petition for a writ of certiorari, we believe that the Court could consider the Section 1331 question in *Mathias* itself. See Pet. 13. We have suggested, however, that if the Court has serious concerns about its ability in *Mathias* to reach that question or any of the other questions identified above, the Court should grant certiorari in this case as well.[1] The MPSC's assertion that the Section 1331

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[1] The MPSC asserts that *Mathias* is not "identical" to the present case because the underlying state commission decision in *Mathias* is "solely an enforcement decision," whereas the underlying state commission decision in this case is both "an enforcement order and an arbitration order." MPSC Br. in Opp. 9. The MPSC does not explain why such a distinction should have bearing on the questions before this Court. The Fourth Circuit, consistent with

question "is not an issue in *Mathias*" (MPSC Br. in Opp. 10), is accurate only to the extent that certiorari was not expressly sought or granted on that question. But that does not bar the Court from considering whether Section 1331 provides an alternative ground for affirmance of the Seventh Circuit's jurisdictional holding. As our petition notes (at 13), the plaintiff in *Mathias* invoked the district court's jurisdiction under both 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331. The district court, after holding that jurisdiction exists under Section 252(e)(6) to review state commission decisions enforcing interconnection agreements, explained that it therefore did not have to decide whether jurisdiction also exists under Section 1331. The Seventh Circuit presumably did not decide the Section 1331 question for the same reason.[2]

The MPSC argues that certiorari is not warranted on the Section 1331 question because "[t]he United States claims no conflict with any other Circuit Court." MPSC

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other circuits, agreed that a state commission decision approving an interconnection agreement, whether the agreement was negotiated between the parties or arbitrated by the state commission, is reviewable in district court under 47 U.S.C. 252(e)(6). See Verizon App. 38a-39a. No question is presented in *Mathias* or in this case concerning the jurisdiction of district courts over such decisions.

[2] As we note in our petition for a writ of certiorari (at 14), some question may exist with respect to the standing in this Court of the Illinois Commerce Commission (ICC) in *Mathias*, because the lower courts upheld the ICC's underlying decision on the merits. The MPSC argues that it would be "manifestly unjust to deny the ICC the right to appeal," at least with respect to the sovereign immunity issue. MPSC Br. in Opp. 11-12. It is unclear, however, whether a decision that the ICC lacked standing would be "unjust" at all, much less "manifestly" so, since the ICC would be free to litigate the jurisdictional and Eleventh Amendment issues in subsequent cases.

Br. in Opp. 10. The Fourth Circuit itself, however, indicated that its holding on that question is in tension with the Sixth Circuit's holding in *GTE North, Inc.* v. *Strand*, 209 F.3d 909, cert. denied, 121 S. Ct. 380 (2000). See Verizon App. 50a. In *GTE North*, the Sixth Circuit held that certain state commission orders, although not reviewable in district court under 47 U.S.C. 252(e)(6), nonetheless are reviewable under 28 U.S.C. 1331. 209 F.3d at 919-920. In so doing, the Sixth Circuit concluded, contrary to the Fourth Circuit here, that Section 252(e)(6) is not "the exclusive basis" for district court review of "state commission actions that in any way relate to interconnection agreements." *Id.* at 919. There is thus considerable tension, if not outright conflict, between the Sixth Circuit's decision in *GTE North* and the Fourth Circuit's decision in this case. See Verizon Pet. 15-17 (asserting "conflict" between *GTE North* and the decision here).[3]

In any event, whether or not the Section 1331 question, standing alone, would implicate a circuit conflict or otherwise warrant certiorari is beside the point. This Court has already granted certiorari in *Mathias* to consider whether district courts have jurisdiction under 47 U.S.C. 252(e)(6) to review state commission decisions

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[3] *GTE North* involved an order of a state commission that was issued outside "the § 252 process," 209 F.3d at 917, and that preceded the entry and approval of an interconnection agreement. (The Sixth Circuit assumed that interlocutory orders that *are* issued in the Section 252 process are not reviewable in federal court until they are incorporated into a final interconnection agreement.) This case, in contrast, involves a state commission order enforcing a previously approved interconnection agreement. The Sixth Circuit's analysis in *GTE North* could well extend, however, to the sort of order at issue here, if review of such orders were held not to be available under Section 252(e)(6).

enforcing interconnection agreements. If the Court were to decide that jurisdiction does not exist under that provision, without also deciding whether jurisdiction exists under 28 U.S.C. 1331, the uncertainty over whether the district courts may review state commissions' enforcement decisions would persist for at least another two years. Such continued uncertainty, and consequent continued litigation, would be contrary to the interests of the United States, of state regulators outside the Fourth Circuit, and of the telecommunications industry.

Finally, the MPSC summarily asserts that the Fourth Circuit was correct to hold that district courts do not have jurisdiction under Section 1331 over actions contending that a state commission has enforced an interconnection agreements in a manner contrary to federal law. MPSC Br. in Opp. 11. A full discussion of the merits of the Section 1331 question is beyond the scope of this brief. We note, however, that Section 252(e)(6) does not, as the court of appeals perceived (Verizon App. 48a), reflect any congressional intent to preclude actions in district court under more general jurisdictional provisions. Accordingly, even if the court of appeals were correct that Section 252(e)(6) itself authorizes review only of state commission decisions approving or disapproving interconnection agreements in the first instance, that would not constitute clear evidence of congressional intent to preclude review under Section 1331 of other state commission decisions concerning interconnection agreements. See *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991) (where statute contains no provision explicitly barring federal court review, "the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear th[e] action remains unimpaired").

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be held pending this Court's decision in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, and disposed of as appropriate in light of the decision in that case; alternatively, the petition should be granted and the case should be considered together with *Mathias*.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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